IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.554 OF 2004

IN

SUIT NO.510 OF 2004

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Navyug Co.operative Housing
Society Ltd. & Anr. ...Plaintiffs

v/s.

Shri Vile parle Kelavani
Mandal & Anr. ...Defendants

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Mr.N.H.Seervai with Mr.J.P. Sen and Ms.Rajani Divkar i/b Little & Co. for the Plaintiffs.

Mr.Rohit Kapadia with Mr.S.K.Sirvastav and Mr.Narayan Sahu and Ms.Chetna Vyas i/b S.K.Srivastava & Co. for the Defendant No.1.

Mr.Virag Tulzapurkar with Mr.Sandip Parikh, Mr.Nishant Thakkar i/b Mahenow Llavia for Defendant No.2.

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CORAM: D.K.DESHMUKH, J.

DATED: 11TH MARCH,2005

P.C.:

1. This Notice of Motion is taken out by the Plaintiffs. The Plaintiffs by this Notice of Motion seeks several interim orders. However, at the hearing the learned Counsel appearing for the Plaintiffs stated that the Plaintiffs are claiming interim order only in terms of prayer clause a(ii) i.e. an order of temporary injunction restraining the Defendant No.1 from using any part of the land which is given on lease to them by the Plaintiff No.1 and other Co.operative Societies and structures standing thereon for any commercial use.

2. The facts that are material and relevant for deciding this Notice of Motion are

. The Plaintiff No.1 is a Co.operative Society registered under the Bombay Co.operative Societies Act, now deemed to be registered under the Maharashtra Co.operative Societies Act. Along with 13 other Co.operative Housing Societies. Plaintiff No.1 owns residential plots of land in Juhu Vile Parle Development Scheme. In the lands which are allotted to the 14 Co.operative Societies, there were several plots which were reserved for public utilities. The plots which were reserved for the public utilities were given on lease to the Defendant No.1, which is a Public Trust, by three lease deeds. The first lease deed is dated 5th November, 1962, the second lease deed is dated 28-7-1965 and the third lease deed is dated 19-3-1981. Copies of the lease deeds are to be found at Exh.C, Exh.E and Exh.I to the plaint. In all these lease deeds there is a negative covenant prohibiting the use of the land which is granted on lease to the Defendant No.1/trust for any purposes other than education. According to the Plaintiffs, on the lands which were given on lease to the Defendant No.1, on plot No.U-1 in the year 1973 one Hall was constructed having an area admeasuring 16000 sq.ft. called "Bhaidas Hall" which

is being used for public entertainment function since,1973. The Defendant No.1 started using open ground admeasuring about 70000 sq.ft. from the same plot No.U-1 for the purpose other than education from the year 1973. According to the Plaintiffs, on plot No.U-1 the Defendant No.1 had constructed a hall admeasuring about 5000 sq.ft. in the year 1975, which is called "Santohba Hall" and that Hall was being used only for the purpose of education. According to the Plaintiffs, that hall was enlarged in the year 2000 and the Defendant No.1 started using that hall also for non-educational purpose. According to the Plaintiffs, on Plot No.U-15 in the year 1999 the Defendant No.1 constructed a hall admeasuring 10000 sq.ft. called "Babubhai Jagjivandas Hall" and the Defendant No.1 started using that hall for commercial purpose by giving it on hire for marriages and other ceremonies. In the year 2002, according to the Plaintiffs, the Defendant No.1 constructed another hall admeasuring 2000 sq.ft. called "Juhu Jagruti Auditorium". Defendant No.1 started hiring out this hall also for commercial activities and entertainment programmes. According to the Plaintiffs, in the year 2004 the Defendant No.1 constructed a hall admeasuring 12000 sq.ft. on

plot U-15, called "Pravin Gandhi Pavilion" and the Defendant No.1 is using this hall also for the purpose other than education. According to the Plaintiffs, this hall is being hired out by Defendant No.1 for marriages and other ceremonies. According to averments in the plaint, the halls mentioned above constructed by the Defendant No.1 on the lands which are leased out to the Defendant No.1 by the Plaintiff No.1 and other 13 Co.operative Societies for commercial purpose. These halls are being let out to various private parties for holding events and function including marriages, meetings and entertainment programmes. According to the Plaintiffs, this is contrary to the negative covenants in the lease deeds. Therefore, the Plaintiffs by this suit claim a permanent injunctions restraining the Defendant No.1 from using any part of the land for any commercial purpose or for any purpose other education.

3. The defence of the Defendants is not that the above said halls are not being used for holding marriage ceremonies, meetings, entertainment programmes etc. According to the Defendant No.1 also the halls are being used for the purposes mentioned

above, but according to the Defendant No.1 the entire income that is derived from such use of the halls and open ground is utilised for the purpose of running various educational institutions which are being run by the Defendant No.1 on the land which has been leased out to them. It is also the case of the Defendant No.1 that when Bhaidas Hall was constructed in the year 1973 the Defendant No.2 which is the Federation of the 14 Co.operative Societies had given no objection for the hall being used for public entertainment purpose. According to the Defendant No.1 the halls are being used for the same purpose for a long time to the full knowledge of the Plaintiff No.1 and its members. At no point of time any objection was raised by them, and therefore, according to the Defendant No.1 it amounts to acquiescence. It is also urged that the recitals in the lease deeds create right in favour of all the 14 Co.operative societies and therefore all the 14 societies should have joined in the suit either as Plaintiff or as the Defendant. It is further claimed that as the property is being used for the same purpose for a long time, now this use should not be stopped by an order of temporary injunction.

4. I have heard the learned Counsel for both sides at length. In my opinion, one has to first see what are the covenants in the lease deeds to which the relief claimed by this notice of motion relates. So far as the lease deed at Exh.C dated 5-11-1962 is concerned, the relevant covenant is to be found in paragraph 6 (a), which reads as under:-

> 6(a) To use the demised premises for the purpose of constructing thereon buildings and other structures necessary or convenient for conducting a college or colleges and other educational institutions and all other activities incidental thereto and to establish and conduct thereon such college or colleges and other educational institutions and other incidental activities and not to use the demised premises or any part thereof or the buildings erected thereon or permit the same to be used for any other purpose;

So far as the lease deed at Exh.E dated 28th July, 1965 is concerned, the relevant covenant is found in

clause (6). It reads as under:

> To use the demised premises for the purpose of constructing thereon buildings and other structures necessary or convenient for conducting a Polytechnic and allied educational institutions and all other activities incidental thereto and to establish and conduct thereon such Polytechnic or allied educational institutions and other incidental activities and not to use the demised premises or any part thereof or the buildings erected thereon or permit the same to be used for any other purpose.

And So far as the lease deed dt.19th March, 1981 at Exh.I is concerned, the relevant covenant is to be found in paragraph 1(f) of the lease deed. It reads as under:

> 1(f)Not to use or permit the said plots and/or the building for the time being forming part of the said plots or any of

them or any part thereof to be used for any purpose other than for constructed structures to be used for the establishment and running of educational institutions for (1) Commerce Science and Arts Disciplines and (2) Institute for Management Studies and for such other objects of Public Utility permitted by the objects of the said Shri Vile Parle Kelavani Mandal.

5. Perusal of the above quoted covenants contained in the lease deeds shows that the land was granted on lease to the Defendant No.1 and it was to be used for construction buildings for conducting a college or colleges and other educational institutions and activities incidental thereto. There is a express negative covenant contained in the lease deed that the Defendant No.1 shall not use the demised premises or any part thereof or a building erected thereon for any purpose other than education. It is clear that the recitals in the lease deeds quoted above have nexus with the land which is given on lease and its use and not with the income that may be derived from the use of the land. There is an

express provision made that the land shall not be used for any other purpose. The negative covenant is in relation to the use of the land given on lease and not in relation to the income derived from the land. In so far as the power of the court of enforcing negative covenant is concerned, the position in my opinion is settled that though the court has generally discretion whether to grant or not to grant an order of injunction, but when a party comes to the court seeking an injunction restraining breach of a negative covenant, then once it is established to the satisfaction of the court that the Defendant has committed breach of the negative covenant contained in the agreement between the parties, the court does not have any discretion in the matter and if the breach of negative covenant is established the court has to grant an injunction. Because in such a situation the party, in whose favour the negative covenant operates, comes to the Court for specific performance of the obligation taken on by the Defendant. If a party with open eyes accepts that if he is given lease of the land he will use the land only for the stated purpose and further undertakes not to use the land for any other purpose, and still starts using the land for an

unauthorised purpose, in such a situation granting injunction restraining the person from using the property for unauthorised purpose is to give the sanction of the process of the court to that course of action which the parties have already agreed to while entering into the contract. The record of this case clearly reveals that there is a clear negative covenant prohibiting the Defendant No.1 from using the land as also the buildings constructed on the land for any purpose other than education. That the income derived from the use of the buildings and the land by using it for purposes other than education is being used for the purpose of education, in my opinion, cannot be a defence to the clear negative covenant which is contained in the lease deeds. The negative covenant is not to use the land and the buildings constructed thereon for any purpose other than education. The averments in the plaint and the affidavit filed in support of the Notice of Motion show that the Defendant No.1 is earning huge amounts by permitting use of the land and the buildings which are constructed on this land for commercial purpose. May be the entire income is being used by the Defendant No.1 for the purpose of running the educational institutions, but in my

opinion, that cannot be a valid defence. The Defendant No.1 is not permitted to use the land and the building constructed thereon for any purpose other than education and that covenant contained in the lease deeds is binding on the Defendant No.1.

5A. The negative covenant in the lease deed is absolutely clear. The use of the land and the building constructed thereon by Defendant No.1 for purpose other than eudcation is admitted. The Defendant No.1 is public charitable trust running educational institution. In this back ground, in my opinion, once it was pointed out to the Defendant No.1 that what it is doing is contrary to its solemn undertaking, the Defendant No.1 should have voluntarily come forward to discontinue the use of the land and buildings constructed thereon contrary to the agreement between the parties. But it appears that to have such expectations from educational institutions now a days is unrealistic. The conduct of the Defendant No.1 of approaching the Defendant No.2 in 1993 for a No Objection Certificate in 1973 for use of Bhaidas Hall for the purpose other than education shows that the Defendant No.1 also knew that without no objection

from the leassor they can not use Bhaidas Hall for the purpose of public amusement. I do not find any explanation given by the Defendant No.1 as to why such a no objection was not soguht before using other halls constructed on the land for the purpose other than education. Surely, no objection given for use of Bhaidas Hall for public amusement does not amount to no objection for use of all the buildings constructed and to be constructed on the land for purpose other than education. It was urged that the decision to use the buildings and land for the purpose other than education was taken by Managing Committee of Defendant No.1, which had as a member a nominee of the defendant No.2 and therefore the Plaintiffs can not raise an objection. The nominee of the Defendant No.2 on the Managing Committee of Defendant No.1 does not have the power to waive the clear negative covenant in the lease deeds. The action of the nominee also do not operate as estoppel against the Plaintiffs. If according to the Defendant No.1, the conduct of the nominee of voting in favour of the resolution amounts to no objection from the 14 societies then the Defendant No.1 has not explained why in 1973 no objection was sought and obtained from the Defendant

No.2. All the defences raised by the Defendant No.1 lack substance. Therefore the Plaintiffs are entitled to have the negative covenant enforced against the Defendant No.1.

6. The correspondence available on record and the affidavit shows that so far as "Bhaidas Hall" is concerned, it is constructed in the year 1973 and the Defendant No.2 had given no objection to its use for a non-educational purpose, in my opinion, in view of clear no objection given by the Defendant No.2, it will not be appropriate to grant an order of temporary injunction in relation to Bhaidas Hall. So far as "Jashoda Rang Mandir" is concerned, that is being used for non-educational purpose from 1973. Though there is no clear no objection found, the learned Counsel appearing for the Defendant No.1 submits that in view of long user of the land it will not be appropriate to stop the user by an order of temporary injunction. So far as other halls are concerned, they are being used for commercial purpose after 1999. Perusal of the correspondence shows that an objection was raised in 1999 by the Plaintiffs for use of the halls for any purpose other than education. So far as the objection

raised on behalf of the Defendant No.1 that the negative covenant is in favour of all the 14 Co.operative Societies and all the 14 societies, therefore have to be brought before the court either as Plaintiff or as the Defendant is concerned, in my opinion, even the proposition is taken to be correct, then also in the present case the Defendant No.2 is the Federation of all the 14 Co.operative Societies and even the position that the Defendant No.2 represents all 14 Co.operative Societies is accepted by the Defendant No.1 themselves when they secured a no objection certificate from the Defendant No.2 in relation to Bhaidas Hall in the year 1973 and the submission that the conduct of the nominee of Defendant No.2 on the Managing Committee of the Defendant No.1 amounts to waiver of the rights of the 14 societies.

7. In the result, therefore, in my opinion, it will be appropriate to grant this Notice of Motion in terms of prayer clause a(ii). It is clarified that this order will not apply to Bhaidas Hall and Jashoda Rang Mandir, which are constructed on Plot U-1. It appears that the other halls are being used

for commercial purpose from 1999 onwards. Therefore, it is possible that the Defendant No.1 must have given bookings of these halls to many persons. In order to avoid inconvenience to the persons who might have taken bookings in these halls, it is directed that this order will come into force after a period of six weeks from today.

Notice of Motion disposed.

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